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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

IN RE THE JOHN BASMAJIAN LIVING TRUST DATED JANUARY 14, 1985.	B156908 (Los Angeles County Super. Ct. No. LP006178)
CARLA ADELMANN, Petitioner and Respondent, v. RICHARD J. BASMAJIAN, Objector and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Manly Calof, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Richard J. Basmajian and Ronald P. Kaplan for Objector and Appellant.

Beltran, Beltran, Smith, Oppel & MacKenzie and Thomas E. Beltran for Petitioner and Respondent.

INTRODUCTION

This is the second appeal emanating from a dispute between appellant Richard Basmajian (Basmajian) and his sister, respondent Carla Adelmann (Adelmann), over the estate of their father. In the present case, Basmajian appeals from an order finding that a December 1, 1997, amendment to a trust was the product of undue influence and therefore null and void. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Following the usual rules on appeal, we construe the facts in the light most favorable to the judgment. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

1. *The initial facts*.[1]

Basmajian and Adelmann are the children of John Ohanias Basmajian (hereinafter decedent). Decedent had remained friends with his two former wives, Sara Kazarian, the mother of Basmajian and Adelmann, and Doris Basmajian. Suzanne Graham had been decedent's girlfriend since 1980.

Adelmann lived at 19951 Labrador Street, Chatsworth, in a home bought by decedent in 1983. Although title was taken in decedent's name, everyone understood that the house was to be Adelmann's. Over the approximate 17 years Adelmann resided in the house, she paid decedent $600 per month. By 1991, the home had been paid off. By 1997, decedent thought the house was worth either $200,000 or $250,000.

Basmajian was an attorney and had a real estate license. Decedent trusted Basmajian, whom decedent relied upon and believed to be competent. In his past business dealings, decedent had depended upon Basmajian's advice.

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[1] The parties have lodged copies of the trial exhibits and have stipulated to their authenticity.

2. *The January 1985 trust.*

On January 14, 1985, decedent executed a will. He also executed and funded a living trust, which became irrevocable at decedent's death. Decedent did not involve Basmajian in drafting these estate documents. Pursuant to the trust, Adelmann was to receive the Labrador home; Sara Kazarian and Doris Basmajian were each to receive $20,000; the residue (including an apartment building on Hesby Avenue where decedent lived) was to be divided equally between Basmajian and Adelmann; and Basmajian and Adelmann were to be co-trustees.

Decedent was a man of few words. He was not articulate; he would "shrug and say a couple of words, and [others] were supposed to interpret . . . ." Decedent told a number of people that he wanted Adelmann and Basmajian to split his property 50-50. Given that Adelmann was to receive her home, this would mean that after Adelmann received the home, the residue would be split equally between Adelmann and Basmajian. Adelmann understood that everything was to pass "free and clear . . . ."

At times, decedent was concerned about Adelmann's ability to manage money, including that she would tithe 10 percent of her income to her church when she could not afford to do so. Prior to decedent's death, Adelmann was only giving her church a few dollars each week.

3. *The 1992 "Beeks amendment."*

Gary Beeks (Beeks) was a law school friend of Basmajian's. In approximately May 1992, pursuant to Basmajian's instructions, and without decedent's knowledge, Beeks prepared a trust amendment.[2] Basmajian paid for the preparation of the amendment. Basmajian presented the amendment to decedent, who refused to sign it. The "Beeks amendment" earmarked the Labrador house to Adelmann. It also provided that Adelmann's share of

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[2] Basmajian testified he acted upon decedent's directions.

decedent's property (including the Labrador home) would be held in trust for her, rather than distributed as an outright gift; that Basmajian was to be the sole trustee; that Basmajian was to receive additional trust assets equal to *one-half* of the equity in the Labrador house; and that Basmajian had the discretion to obtain his share outright or leave it in trust.[3]

4. *The $250,000 loan.*

In 1995, decedent loaned $250,000 to Basmajian to purchase a banquet hall. The loan was subsequently memorialized in a 1996 promissory note. Basmajian made one $12,500 interest payment on the loan.

5. *Events between June 1997 and August 1997.*

On June 15, 1997, Adelmann's husband (Joel) of approximately 20 years left her. Some time after August 1997, decedent reviewed proposed language in divorce papers that would assure Joel would not receive anything from decedent's estate. This would have satisfied decedent's concerns about protecting Adelmann from Joel.

On June 17, 1997, decedent was diagnosed with lung cancer. Thereafter, he had chemotherapy and radiation treatments.

Shortly after decedent was diagnosed with cancer, decedent, Basmajian, and Adelmann met at Adelmann's home. Decedent stated that his estate plan should be changed. He wanted to split everything. Adelmann went into her bedroom crying.

In August 1997, decedent was hospitalized. Decedent believed he was about to die. He wanted to see an attorney to make sure Adelmann was protected

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[3] According to Basmajian, Beeks made an error in drafting the amendment as "to evenly divide the property . . . [Basmajian should have received] an amount equal to 100 percent of the equity in the Labrador house . . . ."

and to make sure his estate was in order. Decedent stated he wanted to "dot the i's and cross the t's."

On approximately August 8, 1997, Beeks brought the 1992 Beeks amendment to decedent in the hospital. Adelmann, Basmajian, Beeks, and Susie Graham were in the hospital room. Recollections of the meeting varied, although everyone agreed that decedent was confused, and would jump from topic to topic. Memories differed as to whether there were discussions about specific monetary gifts to individuals other than to Adelmann and Basmajian. Susie Graham could not recall exactly what occurred; she did remember that there were discussions about changing the trust to clarify it. Beeks remembered going over the valuation of decedent's assets, including the Labrador home. Decedent brought to everyone's attention the $250,000 loan to Basmajian. Beek[s] notes indicate that the idea was that the loan and the house "appeared to be awash [*sic*]." Adelmann testified that decedent did not say he wanted to forgive the note. Taxes were discussed and Beeks said decedent's estate plan was still good.

Adelmann was upset because the Beeks amendment gave Basmajian control over her funds. Adelmann remembered decedent stating that he did not want to make Basmajian sole executor, but rather he would leave things "as is."

At the end of the August 8, 1997, meeting, decedent did not sign the Beeks amendment. Beeks and Adelmann understood that Beeks was to do nothing further. However, it seemed Basmajian was to consult with a tax expert to determine if the loan should be paid back.

Basmajian's friend testified that after the meeting, decedent rolled papers into a ball, threw them to the floor, and emphatically stated he was not signing anything, even though Basmajian wanted him to.

6. *The "Averbach amendment."*

In August 1997, Basmajian had conversations with persons from the Averbach law firm. Basmajian provided the firm with a copy of the Beeks

amendment so it could be "touched up." At Basmajian's direction, the firm prepared a trust amendment. With regard to the assets to be distributed to Basmajian and Adelmann, the "Averbach amendment" provided the following: the Labrador home was to remain in trust for Adelmann; Basmajian was to receive an offset equal to 100 percent of the equity in the Labrador home;[4] Basmajian and Adelmann were to split equally the remaining assets; Basmajian was to receive his share outright; and Adelmann's share was to remain in trust, with Basmajian as the sole trustee. Prior to drafting the Averbach amendment, no one from the Averbach firm discussed it with decedent. Although Basmajian testified that the Averbach firm was chosen for its tax expertise, it does not appear Basmajian had any tax saving discussions with the firm.

A secretary from the Averbach firm brought the Averbach amendment and other estate documents to the hospital. Basmajian was present. Decedent did not sign the amendment or the other documents.[5]

After decedent was released from the hospital, Basmajian gave him the Averbach amendment. Decedent refused to sign it.

Between August and November 1997, decedent was hospitalized at least one more time.

7. *Decedent's last illness and the signing of the trust amendment.*

On November 27, 1997, Thanksgiving Day, decedent was admitted into the hospital. Basmajian took charge of decedent's medical care. Decedent was in a significantly weakened physical condition. His medical problems included lung

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[4] According to Basmajian, this corrected the error that had been contained in the Beeks amendment. (See fn. 3.)

[5] According to Basmajian, the Averbach firm had made a mistake in drafting a deed and once that mistake was discovered, the amendment was not given to decedent.

cancer, chronic obstructive pulmonary disease, and superior vena cava syndrome.[6] He was struggling to breathe, had a fast heart rate, and needed quite a bit of oxygen.

Decedent's lungs were filling up with fluid. He was not getting enough oxygen into his bloodstream or to his tissues. He had dyspnea, the subjective sense of suffocating. Decedent was in severe distress, hungry for air, agitated, and frustrated by his inability to perform normal activities.

On November 30, 1997, at about 8:00 p.m. Basmajian told the medical staff that decedent was confused. Basmajian received a dose of morphine sulphate.

On December 1, 1997, decedent received respiratory therapy, where he received preventol. He also received a number of other medications, including, a narcotic, a mild tranquilizer, and a drug to improve his pulmonary function.

On December 1, 1997, Basmajian went to decedent's hospital room bringing with him a trust amendment and other documents, including powers of attorney. Decedent talked to Basmajian, alone. Decedent was wearing an oxygen mask. At Basmajian's request, Judd Matsunaga, an attorney and notary, arrived.

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[6] Chronic obstructive pulmonary disease is destruction of lung tissue resulting in less ability to oxygenate the blood. Decedent's chronic obstructive pulmonary disease was fairly advanced.

Superior vena cava syndrome causes swelling in limbs. It means that the "cancer has grown to an extent that it surrounds [the] large blood vessel bringing blood back from the head and arms and squeezes it down so that it has a very narrow opening to get the blood through. [¶] . . . [¶] [E]dema fluid . . . develops as there is pressure, gradiant [*sic*], so fluid is leaking out of the blood vessels into the surrounding tissues. [¶] The fellow's arms take on the look of Popeye the sailor with large [*sic*] instead of muscles . . . bulging edema tissue. [¶] The face is usually purplish . . . because of the filling of all the blood vessels with blood, there is this stacked pressure again. [¶] All of the blood vessels in the arms and head are congested with blood, making it a little more difficult to pump the blood out to these extremities in the first place once all the tissue spaces have been filled." Mental clouding is often part of this syndrome.

At approximately 10:00 a.m., with only Basmajian, Matsunaga, and decedent in the hospital room, decedent executed the trust amendment, which was then notarized. Basmajian put the amendment in his file, without telling anyone and without sending anyone copies.[7] Thereafter, Basmajian paid for Matsunaga's services.

At the time decedent signed the trust amendment, decedent was not getting adequate blood supply to the brain and he was struggling to breathe. Because of decedent's oxygenation level, his mind was cloudy, he had a major problem concentrating, and his reasoning was impaired. The superior vena cava syndrome and the medications he was receiving also decreased decedent's mental functioning.

Those who visited decedent that day remembered decedent as being spaced out, very confused, doped up, and unable to hold a conversation.

Decedent's weakened physiological position and his mental condition would make him more susceptible to having his will imposed upon. His ability to make rational decisions was decreased.[8]

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[7] Decedent also executed other documents, such as powers of attorney.

[8] Basmajian and Adelmann each presented medical experts.

The opinion proffered by Adelmann's expert, Dr. Bruce Nelson, was based upon decedent's medical condition, the medications given to decedent, and his oxygenation level. Dr. Nelson was a family practitioner. He had seen decedent a few months before he died.

Basmajian presented the testimony of Dr. Noel Lee Chun, a neuro-anesthesiologist. Dr. Chun acknowledged that decedent was in a weakened physiological position and would be more susceptible to others imposing their will upon him. However, Dr. Chun testified that determinations about mental status cannot be made from oxygenation saturation, nothing in the medical records suggested that the level of oxygen to decedent's brain or the superior vena cava syndrome would have made decedent mentally incompetent, and the medications would not have impaired decedent's mental functioning.

At 12:00 noon, decedent was given morphine sulfate.

The next day, on December 2, 1997, a tube was inserted and a large amount of fluid was drained from decedent's lungs.

On December 2, 1997, Basmajian contacted Griffin Financial Services (Griffin) where decedent had accounts. Without identifying himself as decedent's son, but providing decedent's social security number, Basmajian directed that some accounts be liquidated. Griffin assumed the call had been made by decedent. Griffin mailed a check in the approximate sum of $70,000 to Basmajian's home address.

8. *The terms of the executed trust amendment.*

The trust amendment signed by decedent on December 1, 1997, was typed by Basmajian's secretary. It had been drafted by Basmajian, who had altered some of the terms of the Averbach amendment. The difference was that in the amendment signed by decedent, Adelmann was given an additional $50,000. According to Basmajian this gift was an offset because Adelmann was to receive the Labrador home, and the $250,000 note was to be forgiven. However, the amendment did *not* state that the note was to be forgiven.[9]

The key provisions of the amendment signed by decedent provided the following: Adelmann was to receive her home and $50,000, which were to be

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Basmajian also presented the testimony of Dr. James Spar, a geriatric psychiatrist. He opined that decedent probably did not become incompetent until after December 8, 1997. Dr. Spar testified that decedent's physical condition would have made him mildly susceptible to undue influence. Dr. Spar admitted that a person's threshold of susceptibility to undue influence was less than required to find a person lacked mental capacity. Dr. Spar conceded that factors such as distractibility, agitation, confusion, inattention, and dependency, all should be considered when discussing undue influence.

[9] Basmajian testified it did not occur to him to put in writing that the note was to be forgiven.

held in trust for her; the residue was to be split equally between Adelmann and Basmajian; Basmajian was to receive his share outright; Adelmann's share was to be held in trust; and Basmajian was to be the sole trustee. The amendment did *not* alter the provision in the original trust document that left $20,000 each to Sara Kazarian and Doris Basmajian.

9. *Decedent's death and events thereafter.*

Decedent died on December 14, 1997. At the time, his assets were worth approximately $1.4 million, consisting primarily of the Labrador house, the Hesby apartment building (approximately $600,000-$750,000), mutual funds (approximately $130,000), an indemnity account (approximately $60,000-$100,000), another account ($42,000), a checking account, and the $250,000 note.

10. *Events occurring after the death.*

Basmajian forgave himself the $250,000 loan.

Basmajian took over the management of the Hesby apartment building. Basmajian did not make any payments to Adelmann from the proceeds of the Hesby apartment building until May 1998. These payments stopped in June 1998, after Adelmann filed the initial petition. The payments were reinstated approximately 11 months later, pursuant to court order.

According to Basmajian, he would charge approximately $150 per hour as trustee and if allowed to charge for his attorney services, he would bill $300 per hour. Basmajian could not estimate the number of hours he had spent either as trustee or as attorney for the estate.

11. *These proceedings.*

a. *The initial proceedings and the first appeal.*

On June 12, 1998, Adelmann filed a verified petition to declare void the 1997 trust amendment based upon undue influence. Adelmann contended Basmajian had coerced her terminally ill and hospitalized father into executing the

amendment. Adelmann also sought to remove Basmajian as trustee, an outright distribution of trust assets, and an accounting.

Adelmann objected to the accounting provided by Basmajian, which included Basmajian's conclusion that the $250,000 note had been gifted to him and was not an asset of the estate. The trial court ordered Adelmann's objections resolved by a referee. The referee found that "The $250,000 promissory note, dated 4/1/96 . . . was not later made a gift to Richard Basmajian, but [was] an asset of the John Basmajian Trust . . . ." The trial court overruled Basmajian's objections to the referee's report.

Basmajian appealed. On appeal in Case no. B146995, Basmajian did not challenge the sufficiency of the evidence to support the referee's finding. Rather, Basmajian contended the referee lacked the authority to consider the characterization of the $250,000 as a loan and asset of the estate. In an opinion filed by this division on July 26, 2002, we affirmed.

b. *The trial and findings of the trial court*.

Trial on the remaining issues was held on nonconsecutive days between January 19, 2001, and June 25, 2001. Closing arguments were submitted in writing.

The trial court issued a statement of decision finding that the "December 1, 1997[,] amendment to the John Basmajian Trust is the product of undue influence perpetrated on the decedent by . . . Richard Basmajian, and is therefore null and void."

The trial court found the following:

Decedent "looked to [Basmajian] for advice on business, legal, and other matters, in part, because [of Basmajian's] education and status as an attorney. [Twice] after the completion of the 1985 trust, [Basmajian] contacted and met with several attorneys, without the knowledge or authorization of the decedent. [These other attorneys never met with decedent.] When the decedent was

presented with the drafts of new testamentary documents[,] prepared at [Basmajian's] direction, the decedent refused to sign those documents. At the time he refused to sign those documents, he read and understood the nature of the changes to his 1985 trust.

"[During an August 1997, hospitalization,] decedent stated that he wanted to see an attorney immediately. [A meeting was held in decedent's hospital room, attended by Basmajian, Adelmann,] attorney Gary Beeks, and Susie Graham. . . . [W]ith respect to his estate plan, [decedent] wanted to 'dot the "i's and cross the t's," meaning he wanted to make sure it was in order.'. . . [T]he decedent brought to the attention of everyone . . . that the $250,000.00 note from Richard Basmajian was a loan. . . . Beeks . . . advised the decedent that the existing estate plan was still good. . . . The intent of the decedent, was that his daughter would receive the 'Labrador house' outright, and the balance of the estate would be divided between both siblings. . . .

"On at least two occasions, the decedent refused to sign trust amendments. . . . [T]he decedent was shown [and refused to sign] the Averbach amendment . . . because he was satisfied with the present estate plan.

"On Thanksgiving day, 1997, the decedent was admitted to the hospital. His medical problems included Lung Carcinoma, Chronic Obstructive Pulmonary Disease, and Superior Vena Cava Syndrome. As a result of his condition, the decedent was in a significantly weakened physical condition.

"On December 1, 1997, the decedent's lungs were filling up with fluid. As a result of his condition, he was confused, in a physically weakened condition, and therefore susceptible to the imposition of another's will on him, or into being tricked into signing a document. . . .

"[Basmajian] benefitted from the trust amendment, by virtue of becoming sole trustee with the right to manage all assets of the trust.

"[Basmajian] . . . had a confidential relationship with the decedent. This confidential relationship afforded [Basmajian] the opportunity to control and manipulate the testamentary act such that [Basmajian] commandeered the testamentary process. [Basmajian] actively participated in the procurement, drafting, creation, and execution of the trust amendment [signed by decedent]. The decedent's mental and physical condition, at the time of signing the documents at issue, was such as to permit the subversion of his freedom of will. [Basmajian] subjugated decedent's will to that of his own, which caused a disposition that was different than if decedent had followed his own inclinations. Further, the disposition contained in the trust amendment . . . was different from decedent's intent as expressed by him [previously]. The decedent did not understand the significance of the documents presented to him by [Basmajian], or the nature and content of what he was signing. [¶] . . . [¶]

"At the time that decedent signed the December 1, 1997 trust amendment decedent was in a physically weakened state . . . and vulnerable to the undue influence of [Basmajian] by reason thereof, and by reason of the treatment for his condition, and the substantial stress and anxiety resulting from his medical condition and treatment."

The trial court ordered that the amendment was null and void. Basmajian appealed.

DISCUSSION

1. *Standard of review.*

" 'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable

inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' [Citation.]" (*Bickel v. City of Piedmont, supra*, 16 Cal.4th at p. 1053.)

However, " '[a] decision supported by a mere scintilla of evidence need not be affirmed on review.' [Citation.] '[I]f the word "substantial" [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable . . . , credible, and of solid value . . . .' [Citation.] The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citation.] While substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations]." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

Some authority suggests undue influence must be shown by clear and convincing evidence. (E.g., *Estate of Ventura* (1963) 217 Cal.App.2d 50, 58.) "Where the trial court has determined that a party has met the 'clear and convincing' burden, that heavy evidentiary standard then disappears." (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1111, fn. 2.) On appeal, the usual rule of conflicting evidence is applied, and we determine if there is substantial evidence to support the trial court. (*Ibid.; Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881.)

2. *There is substantial evidence to support the trial court's finding of undue influence.*

Basmajian contends there is no substantial evidence to support the trial's court's finding of undue influence. This contention is not persuasive.

a. *Undue influence.*

"The principle that a will is invalid if procured by the undue influence of another predates the 1931 adoption of the Probate Code [citation], but is now codified in section 6104. Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency. [Citations.]" (*Rice v. Clark* (2002) 28 Cal.4th 89, 96, fn. omitted; *Estate of Franco* (1975) 50 Cal.App.3d 374, 382 ["Undue influence consists of conduct which subjugates the will of the testator to the will of another and constrains the testator to make a disposition of his property contrary to and different from that he would have done had he been permitted to follow his own inclination or judgment"]; *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182 [undue influence principles applicable to estate plan formalized by simultaneously executed inter vivos trust and will].)[10]

All of the surrounding circumstances are considered in determining if there is undue influence. *Estate of Lingenfelter* (1952) 38 Cal.2d 571 at page 585 articulated "[t]he indicia of undue influence . . . as follows: '(1) The provisions of the will were unnatural. . . . (2) the dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution; (3) the relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act; (4) the decedent's mental and physical condition was such as to permit a subversion of his freedom of will; and (5) the chief beneficiaries under the will were active in procuring the instrument to be executed.' [Citation.] These, coupled with a confidential

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10 Probate Code section 6104 provides: "The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud, or undue influence."

relationship between at least one of the chief beneficiaries and the testator, altogether were held 'sufficient to shift the burden to the proponents of the will to establish an absence of undue influence and coercion and to require the issues to be determined by the jury.' [Citation.]"

"[U]ndue influence can be established by circumstantial evidence so long as the evidence raises more than a mere suspicion that undue influence was used; the circumstances proven must be inconsistent with the claim that the will was the spontaneous act of the testator. [Citations.] [¶] While the fact that a beneficiary enjoyed a confidential relationship with the testator or actively participated in procuring the will to be executed or that he unduly profited thereby are important circumstances to be considered, standing alone, none of these circumstances is sufficient to prove undue influence." (*Estate of Franco, supra*, 50 Cal.App.3d at p. 382.)

When there is a confidential relationship, the burdens of proof are reversed. Ordinarily, "a person challenging the testamentary instrument . . . bears the burden of proving undue influence ([Prob. Code,] § 8252) . . . [However,] a presumption of undue influence, shifting the burden of proof, arises upon the challenger's showing that (1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument. [Citations.]" (*Rice v. Clark, supra,* 28 Cal.4th at pp. 96-97.) "Where it appears, in addition to [a confidential] relationship, that the will is unnatural and would result in undue profit to a proponent and that he was active in procuring its execution, there is persuasive evidence of undue influence. [Citations.]" (*Estate of Garibaldi* (1961) 57 Cal.2d 108, 113.)[11]

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11 The issue of the trust amendment being "unnatural" is inapplicable here. Provisions are "unnatural" when they prefer strangers rather than natural objects

Lack of mental capacity, and fraud are separate grounds for setting aside a testamentary document. However, the testator's state of mind and fraud can be considered as bearing on the testator's ability to resist importunity. (Prob. Code, § 6104; *Estate of Garibaldi, supra,* 57 Cal.2d at p. 114; *Estate of Woehr* (1958) 166 Cal.App.2d 4, 21; e.g., *Estate of Lingenfelter, supra,* 38 Cal.2d 571.)

b. *Discussion.*

Here, there was substantial evidence to support the undue influence finding.

Basmajian and decedent had a confidential relationship. Basmajian had both attorney and real estate licenses. Decedent trusted Basmajian, whom he believed was reliable and competent. Decedent looked to his son, Basmajian, for advice. The relationship between Basmajian and decedent provided an opportunity for Basmajian to control the testamentary act.

Basmajian actively participated in procuring the executed trust amendment. Without being instructed to do so by decedent, and without the knowledge of others, Basmajian drafted the amendment, and supervised its execution**.** Basmajian had the opportunity to influence decedent's testamentary act.

Basmajian would unduly benefit from the amendment. Undue benefit is a qualitative and not a quantitative test. (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 607.) The determination is a question of fact, to be determined from all of the circumstances, such as by examining a decedent's testamentary intentions. (*Ibid.*) Here, decedent repeatedly reaffirmed that he wanted to leave money to his two ex-wives, the Labrador home to Adelmann, and the remaining assets divided equally between Adelmann and Basmajian, who were to be co-trustees. Adelmann and Basmajian were to have equal control over the residue.

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of a testator's bounty. (*Estate of Nolan* (1938) 25 Cal.App.2d 738, 742.) Preferring one relative over another relative does not make the testamentary provisions unnatural. (*Estate of Welch* (1954) 43 Cal.2d 173, 179.)

The executed trust amendment changed the disposition qualitatively as it gave Basmajian control over Adelmann's share. It put Adelmann's home in trust for her, with Basmajian as trustee. It permitted Basmajian to decide when, or if, Adelmann would receive her share of income from the other trust properties, including the Hesby apartment building.[12] It would have enabled Basmajian to take inappropriate actions without fear of discovery. As examples, Basmajian liquidated the Griffin accounts and forgave the $250,000 loan, saving him the cost of repayment of the loan and any interest owing.[13] Giving Basmajian control, would result in an unwarranted disposition that was inconsistent with decedent's repeated testamentary expressions.

The disposition in the amendment was in variance with decedent's intention. Decedent rejected the Beeks amendment and the Averbach amendment, thereby reaffirming his intent as expressed in the 1985 documents, to have Adelmann and Basmajian be co-trustees.[14] Decedent did not want Basmajian to control. Additionally, decedent had repeatedly expressed the desire that Adelmann was to get her house, and otherwise, Basmajian and Adelmann were to share equally.

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[12] Basmajian contends cash flow problems prevented him from making payments to Adelmann from the Hesby receipts.

Basmajian also claims that he liquidated the Griffin accounts *with* Adelmann's knowledge, he gave Adelmann her share of the proceeds, and he did so to reduce estate taxes.

[13] Adelmann states in her brief that approximately $90,000 interest is owed on the note.

[14] Since decedent wanted his two ex-wives to have cash gifts, it is clear that when decedent indicated he wanted to split everything between Adelmann and Basmajian, decedent was *not* expressing a desire that the *entire* estate was to be split equally.

The relationship existing between decedent and Basmajian afforded Basmajian an opportunity to control the testamentary act. At the time the amendment was executed, Basmajian was primarily responsible for decedent's medical care. Basmajian made sure that no one else was present when the amendment was signed.

When the amendment was signed, decedent was dying from lung cancer. His lungs were filling with fluid. He was not getting sufficient oxygen and he was gasping for air. His ailments, including the superior vena cava, and his medications, were clouding decedent's mind. He was not coherent, was agitated, and was feeling suffocated. Decedent was weakened, mentally and physically. His mental and physical conditions all contributed to making him susceptible to others imposing their will upon him.

These facts provide substantial evidence to support the trial court's finding that there was undue influence bearing directly upon the execution of the trust amendment, sufficient to overcome decedent's will, amounting to the destruction of decedent's free agency.[15]

Basmajian argues that there was no undue influence because the circumstances were not inconsistent with the decedent's voluntary actions. This argument is based upon language in *Estate of Franco, supra*, 50 Cal.App.3d at page 382 that "undue influence can be established by circumstantial evidence so long as the evidence raises more than a mere suspicion that undue influence was used; the circumstances proven *must be inconsistent* with the claim that the will was the spontaneous act of the testator. [Citations.]" (Italics added; accord, *Estate*

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[15] On numerous occasions Basmajian asks that we accept his interpretation of the facts, ignoring the principle that on appeal we construe the facts in the light most favorable to the ruling. We have not succumbed to Basmajian's frequent attempts to have us re-weigh the evidence.

of Welch, supra, 43 Cal.2d at p. 178; *In re McDevitt* (1892) 95 Cal. 17, 33-34; *Hagen v. Hickenbottom, supra,* 41 Cal.App.4th at p. 182.)

Basmajian suggests that "the evidence here is not inconsistent with voluntary action by [decedent] in amending the Trust, but rather indicates a perfectly normal and reasonable progression of events -- albeit often under difficult and trying circumstances -- by which [decedent] came to amend the Trust." Basmajian argues that decedent constantly expressed the desire to split his estate between his two children and to protect Adelmann from Joel and from her spendthrift tendencies. Basmajian suggests that decedent thought the home was worth $200,000 and by giving Adelmann her home and the $50,000 and by forgiving the $250,000 note, the estate would be split equally.

However, Basmajian's suggestion ignores the circumstances proven. As found by the trier of fact, decedent did not want to alter his estate plan. He repeatedly rejected amendments similar to the one signed on December 1, 1997. Prior to signing the amendment, decedent repeatedly had reaffirmed his intent to dispose of his property in the manner detailed in the 1985 trust document. Decedent's desire to protect Adelmann did not translate into a desire to keep her under Basmajian's thumb. Decedent did not intend to forgive the note. The execution of the amendment was not a normal nor reasonable progression of events. Further, as shown by expert medical testimony, at the time decedent executed the trust amendment, his physical and mental states were such that he was susceptible to control by Basmajian. (See fn. 9.)

We further note that the linchpin to Basmajian's argument is that the amendment simply memorialized decedent's desire to have an equal distribution of the estate. This includes the assumption that the note was to be forgiven.

Basmajian carefully avoids the fact that the amendment did not include a provision forgiving the note.[16]

DISPOSITION

The order is affirmed. Costs on appeal are awarded to Adelmann.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, ACTING P.J.

KITCHING, J.

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[16] In his reply brief, Basmajian suggests that his position is not dependent upon forgiveness of the loan. Rather, according to Basmajian, "forgiveness of the loan was just a convenient means, . . . to carry out [decedent's] intent to divide his property 50-50 while still giving the house to [Adelmann. Decedent's] intent could have been carried out without forgiving the loan, by use of the means employed in the Beeks amendment in 1992 (before the loan was made), i.e. by giving [Basmajian] additional assets to equalize the value of the house being given to [Adelmann]." This argument ignores the proven facts that decedent repeatedly rejected the idea of an equalizing payment by refusing to sign the Beeks and the Averbach amendments.